Michigan Law Review

Volume 63 | Issue 7

1965

Admissibility of Parol Evidence in Judicial Determinations of Arbitrability

Michigan Law Review

NOTES

Admissibility of Parol Evidence in Judicial Determinations of Arbitrability

Whether parol evidence of bargaining history is admissible in a court's determination of arbitrability is a problem arising out of the United States Supreme Court's 1960 decisions in the *Steelworkers Trilogy*.[1] The Court there emphasized the national labor policy favoring arbitration as the best means of resolving labor disputes.[2] Citing its earlier *Lincoln Mills* decision[3] interpreting section 301(a) of the Labor Management Relations Act,[4] the Court stated that, in enacting section 301, Congress assigned the question of the jurisdiction of an arbitrator to the courts[5] in the absence of an agreement by the parties specifically assigning the question to an arbitrator. While rejecting a judicial criterion of ordering arbitration of only those grievances as to which there is a bona fide dispute,[6] the Court specifically avoided "the prescription of inflexible rules," stating rather that the lower courts were to be guided by "considerations of the milieu in which the clause is negotiated and of the national labor policy."[7] The parol evidence rule, as often

1. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

2. Indeed, its emphasis extends almost to a presumption of arbitration. "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." United Steelworkers v. Warrior & Gulf Nav. Co., *supra* note 1, at 582-83.

3. Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).

4. 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958) provides: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . , may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amounts in controversy or without regard to the citizenship of the parties." The Court in *Lincoln Mills* stated that § 301(a) allows federal courts to order specific enforcement of collective bargaining agreements providing for arbitration of grievance disputes. Textile Workers v. Lincoln Mills, *supra* note 3, at 451.

5. United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960). This threshhold inquiry is usually characterized as deciding the "arbitrability" of the dispute. Some confusion has arisen because the term is applied to both the question of whether the parties have agreed to give an arbitrator *jurisdiction* to hear a dispute, and whether they have given him *authority* to make a particular kind of award. In the 1960 trilogy the Supreme Court was concerned only with the former, as is this Note. For a discussion of this distinction and its useful effects, see Schmertz, *When and Where Issue of Arbitrability Can Be Raised*, P-H LAB. ARB. SERV., Report Bull. No. 3 July 19, 1962. Procedural arbitrability—determining whether the grievance machinery prior to arbitration has been complied with—should also be distinguished.

6. See International Ass'n of Machinists v. Cutler-Hammer, Inc., 271 App. Div. 917, 918, 67 N.Y.S.2d 317, 318, *aff'd*, 297 N.Y. 519, 74 N.E.2d 464 (1947).

7. United Steelworkers v. American Mfg. Co., 363 U.S. 564, 570 (1960) (concurring opinion of Brennan, J., relating to *American*, *Warrior* and *Enterprise*). Under the authority of Textile Workers v. Lincoln Mills, 353 U.S. 448, 456-57 (1957), the federal

applied, would seem to be the type of inflexible rule that the Court would wish to avoid.

The parol evidence rule excludes evidence of prior or contemporaneous negotiations and agreements offered to vary or contradict an integrated writing.[8] The purpose of the rule is to prevent fraud and perjury, but it is well recognized that the rule often operates to thwart this purpose since such a device, mechanically applied, does not always deal fairly with the human variable.[9] Frequently, evidence of probative value is held inadmissible under the rule. For this reason courts have developed numerous distinctions and exceptions to the rule, purportedly aimed at determining more precisely what the parties meant to provide in their written document. The most frequently invoked exception to the rule allows a court to look to antecedent factors such as negotiations and agreements in order to interpret ambiguities in a writing. Such evidence is admissible even though "it has the effect of filling out the terms of a promise and of determining the character and extent of the performance promised."[10] Moreover, since another purpose of the rule is to give effect to the finality of a writing,[11] when a writing is not a complete and exclusive embodiment of what the parties agreed to, the partial integration exception to the rule may be applicable, and parol evidence may be introduced to show intended additional, consistent terms. The latter exception has particular thrust where disputed terms are of such a nature that reasonable parties might not be expected to include them in the written document.[12]

---

courts are to "fashion" a body of federal substantive labor law. In so doing, they may draw upon, and absorb, any state law which furthers this national labor policy. Moreover, federal labor law, once created, is to be applied to state as well as federal proceedings to enforce labor contracts. Local 174, Teamsters Union v. Lucas Flour Co., 369 U.S. 95, 102-04 (1962).

8. 3 CORBIN, CONTRACTS § 573, at 357 (1960 ed.). See generally *id.* §§ 573-85. The rule is applied to many kinds of written documents, including contracts, wills, and deeds.

9. *Id.* § 575, at 380. Honest, as well as dishonest, men are precluded from testifying under this rule.

10. *Id.* § 579, at 423-25. See, *e.g.*, Fidelity-Phenix Fire Ins. Co. v. Farm Air Serv., Inc., 255 F.2d 658 (5th Cir. 1958); United States v. Lennox Metal Mfg. Co., 225 F.2d 302, 313 (2d Cir. 1955) (suggesting, further, that even ambiguity may not be needed for the courts to examine preliminary negotiations); Garden State Plaza Corp. v. S. S. Kresge Co., 78 N.J. Super. 485, 189 A.2d 448 (1963).

11. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV., 833, 846 (1964). See also RESTATEMENT, CONTRACTS § 237 (1932): "The integration of an agreement makes inoperative to add to or to vary the agreement all contemporaneous oral agreements relating to the same subject-matter; and also . . . all prior oral or written agreements relating thereto."

12. 3 CORBIN, *op. cit. supra* note 8, § 583, at 475. Professor Corbin suggests that the Uniform Commercial Code is in substantial agreement with this proposition and that it may be applied to transactions other than those merely for the sale of goods. UNIFORM COMMERCIAL CODE § 2-202 states: "[A] writing . . . may be explained or supplemented, . . . (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms

The parol evidence rule has its most frequent application in the interpretation of ordinary contracts. A collective bargaining agreement, however, is not an ordinary contract.[13] While the agreement is a contract to the extent that it may be judicially enforced,[14] it is also, in a broader sense, comparable to a compact of self-government, often for large numbers of people, negotiated in the setting of a going enterprise with the common interests of the parties in the balance.[15] To preserve and promote these interests, agreement must of necessity be reached, even if it does not reflect the parties' positions on all matters or encompass the entire spectrum of their relations. Under these circumstances and in the context of the history and custom surrounding bargaining agreements, what is not included in the document may be as important as the terms reduced to writing.[16] This is particularly true when the threshold arbitrability question is at issue since an almost limitless number and variety of grievances can be involved. Because of this vast range of possible disputes, superimposed upon the reliance on business tradition and custom, doubt exists whether, in spite of the application of other contract principles to collective bargaining agreements,[17] the parol evidence rule should be invoked to limit a court's determination of arbitrability to the face of the agreement.[18]

In *International Union of Elec. Workers v. Westinghouse Elec. Corp.*,[19] however, the District Court for the Southern District of New York applied the parol evidence rule in rejecting evidence of prior bargaining history. Plaintiff union had brought suit to compel

---

of the agreement." *Cf.* RESTATEMENT, CONTRACTS § 240(1) (1932); 3 CORBIN, *op. cit. supra* note 8, § 584 (discussion of the *Restatement* position).

13. See generally United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 578-82 (1960); GREGORY, LABOR AND THE LAW 445-57 (2d rev. ed. 1958); Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482 (1959); Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1 (1958); Shulman, *Reason, Contract, and the Law in Labor Relations*, 68 HARV. L. REV. 999 (1955).

14. See note 4 *supra*.

15. See United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 578-81 (1960).

16. "It is based on a mass of unstated assumptions and practices as to which the understanding of the parties may actually differ, and which it is wholly impractical to list in the agreement. It is similarly impractical, if not impossible, to anticipate and guard against all possible future contingencies . . . ." Shulman, *The Role of Arbitration in the Collective Bargaining Process*, in COLLECTIVE BARGAINING AND ARBITRATION 19, 21 (1949).

17. Standards of the proper party to sue, failure of consideration, and notions of bargain and exchange have been suggested as relevant in the collective bargaining setting. Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1, 14-25 (1958).

18. A court should be able to use such extrinsic evidence as relevant circumstances, course of performance, course of dealing, and trade usage in its interpretation of the agreement. See Patterson, *supra* note 11, at 842-52. Indeed, the Supreme Court has looked to the practical construction given to the agreement by the parties. Drake Bakeries, Inc. v. Local 50, Am. Bakery Workers, 370 U.S. 254, 260 (1962).

19. 228 F. Supp. 922 (S.D.N.Y. 1964) (hereinafter referred to as the principal case).

defendant company to arbitrate grievances which the union claimed fell within the clause of the collective bargaining agreement calling for arbitration of grievances involving "the interpretation, application or claimed violation of a provision" of the agreement.[20] The company attempted to introduce evidence of the bargaining history prior to execution of the collective bargaining agreement to show that the exclusionary clause in the agreement "was intended to be exclusionary [as to the jurisdiction of an arbitrator to hear grievances of the type claimed by the union] and not merely a limitation on the authority of an arbitrator [to make a certain award]."[21] The court, however, held that parol evidence of bargaining history is inadmissible when a court is determining the jurisdiction of an arbitrator under a collective bargaining agreement.[22]

Application of the parol evidence rule to evidence going to the *merits* of a grievance, or to the arbitrability question when intertwined with the merits of the dispute, has been justified, as was suggested in the principal case, under the Supreme Court's admonition against judicial involvement in or resolution of the substantive merits of the particular grievance.[23] However, a threshold determination of the arbitrator's jurisdiction does not involve the parties' final rights; it is an inquiry as to who shall decide those rights, or, at the least, whether some basis exists for saying that the rights should be decided by arbitration. Since arbitrability is both by statute[24] and judicial opinion[25] the very issue that the courts are required to determine, the prohibition against examining the merits would not seem to justify exclusion of evidence of bargaining history on a strictly arbitrability issue.[26] The court in *Westinghouse,*

20. The agreement also contained an exclusionary clause stating that "[N]o arbitrator shall . . . be authorized to: (1) Add to, detract from, or in any way alter the provisions of this Agreement . . . ; (2) Establish or modify any wage or salary rate, job classification or classification of any employee . . . ; (4) Make any award involving any matter relating to any pension and/or insurance agreements between the parties . . . ." Principal case at 924.

21. Brief for Defendant, p. 17, principal case.

22. Principal case at 926.

23. *Ibid. Accord,* International Ass'n of Machinists v. International Aircraft Servs., Inc., 302 F.2d 808, 813, 815 (4th Cir. 1962); Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 283 F.2d 93, 95 (3d Cir. 1960).

24. 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958).

25. United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960).

26. See Independent Petroleum Workers v. American Oil Co., 324 F.2d 903 (7th Cir. 1963) (evidence specifically considered, but case decided on other grounds), *aff'd by an equally divided court,* 379 U.S. 130 (1964) (Goldberg, J., took no part in the consideration or decision); Independent Soap Workers v. Procter & Gamble Mfg. Co., 314 F.2d 38 (9th Cir. 1963), *cert. denied,* 374 U.S. 807 (1963); Pacific Northwest Bell Tel. Co. v. Communications Workers, 310 F.2d 244 (9th Cir. 1962); 6A CORBIN, CONTRACTS § 1444B, at 470 (rule should never exclude bargaining history in arbitrability determination); Smith, *The Question of "Arbitrability"—The Roles of the Arbitrator, the Court, and the Parties,* 16 SW. L.J. 1, 12 (1962). Compare Note, *"Arbitrability" of Labor Disputes,* 47 VA. L. REV. 1182, 1192-93 (1961). Moreover, because this is a

nevertheless, concluded that the distinction between a judicial resolution of the merits and a judicial determination of arbitrability was insufficient to justify a different treatment of the evidence in the two situations.[27] While the court seemed concerned with the possible difficulty of distinguishing between interrelated evidence on the two issues "when the alternative is to utilize the services of an arbitrator,"[28] this also appears to be insufficient reason for denying the admission of parol evidence on the arbitrability question where the offered evidence is clear and helpful.[29]

Moreover, even if the parol evidence rule were held generally applicable to collective bargaining agreements, it could be argued that evidence of bargaining history should be admissible under one of the exceptions to the rule, an argument apparently not made in the principal case. The ambiguity exception might, in a proper case, be used to admit evidence to resolve language capable of more than one meaning.[30] Alternatively, although a collective bargaining agreement may be final, it may be at least arguably not complete and exclusive, and consequently, the partial integration

---

suit for specific performance, there is not the problem of requiring the jury to pass on the credibility of the offered evidence.

27. Principal case at 926. The following cases have invoked the rule in terms sufficiently broad to indicate that they would apply it to collective bargaining agreements generally, without differentiation as to whether the evidence relates to the merits or to arbitrability: International Ass'n of Machinists v. International Aircraft Servs., Inc., 302 F.2d 808, 813, 815 (4th Cir. 1962); NLRB v. Gulf Atl. Warehouse Co., 291 F.2d 475 (5th Cir. 1961); Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 283 F.2d 93, 95 (3d Cir. 1960); District 50, UMW v. Pittston Co., 210 F. Supp. 781, 785-86 (N.D. W. Va. 1962); Freight Drivers & Helpers, Local 557 v. Anchor Motor Freight, Inc., of Del., 207 F. Supp. 1, 5 (D. Md. 1962); Newspaper Guild v. Hammond Publishing Co., 48 L.R.R.M. 2577 (N.D. Ind. 1961). *Cf.* Lewis v. Owens, 33 U.S.L. WEEK (6th Cir. Nov. 27, 1964).

In the leading case to the contrary, Pacific Northwest Bell Tel. Co. v. Communications Workers, 310 F.2d 244 (9th Cir. 1962), the court carefully drew the distinction and admitted evidence of the bargaining history going exclusively to the arbitrability issue. The court analyzed *Warrior & Gulf* and decided that the evidence of bargaining history which the majority there ignored went to the merits. In International Union of Elec. Workers, 332 F.2d 485 (2d Cir. 1964), the court excluded parol evidence on the merits, but expressly refused to comment on the admissibility of such evidence relating to arbitrability, suggesting a comparison between the principal case and *Pacific Northwest Bell. Id.* at 490 & n.6.

28. United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 585 (1960).

29. In Pacific Northwest Bell Tel. Co. v. Communications Workers, 310 F.2d 244 (9th Cir. 1962), the court stated that the "almost inevitable interlocking" of the issues of arbitrability and determinaion of the merits does not result in "ousting the courts from any inquiry beyond the bare written words themselves." The question is "whether judicial construction of the arbitrability clause would *require* that the underlying dispute be first *resolved* in order to determine whether it is subject to arbitration." *Id.* at 248. (Emphasis added.)

30. International Union of Elec. Workers v. General Elec. Co., 332 F.2d 485, 490 n.5 (2d Cir. 1964) (bargaining history might not be proper to interpret an exclusionary clause since "to be effective [such a clause] must be clear and unambiguous"); United Elec. Workers v. General Elec. Co., 208 F. Supp. 870 (S.D.N.Y. 1962).

exception might be invoked to allow evidence of the scope of the agreement to arbitrate by showing additional and consistent terms.

A number of courts have taken the position that the parol evidence rule should never be applied to exclude evidence going to arbitrability.[31] The Court of Appeals for the Ninth Circuit, in articulating this view, has held that because of the nature of a collective bargaining agreement, a court cannot be precluded by the parol evidence rule from examining the bargaining history.[32] In order to determine the parties' true intent on the arbitrability of a particular grievance, a court should be permitted to go beyond the broad language of the agreement to discover how the parties have dealt with specific issues.[33] Moreover, the need to consider the bargaining history has been stressed as particularly compelling when a position taken by a party in court is one for which it argued in negotiations but lost.[34] A party may assert that a particular grievance is covered by the language of the contract, even though that interpretation was rejected during negotiations, without interference from the parol evidence rule because he is asserting the *actual import* of the language used rather than the import *intended* by the parties when the contract was written. However, the parol evidence rule will prevent the other party from showing that the asserted construction was considered and rejected during negotiations. To allow a party to succeeed on such a claim because of the court's refusal to examine bargaining history is not only inconsistent with the purposes of the parol evidence rule, but also lays a basis

31. Communications Workers v. Pacific Northwest Bell Tel. Co., 337 F.2d 455 (9th Cir. 1964); Independent Petroleum Workers v. American Oil Co., 324 F.2d 903 (7th Cir. 1963), *aff'd by an equally divided court*, 379 U.S. 130 (1964) (Goldberg, J., took no part in the consideration or decision); Independent Soap Workers v. Procter & Gamble Mfg. Co., 314 F.2d 38 (9th Cir. 1963), *cert. denied*, 374 U.S. 807 (1963); Pacific Northwest Bell Tel. Co. v. Communications Workers, 310 F.2d 244 (9th Cir. 1962); Maryland Tel. Union v. Chesapeake & P. Tel. Co., 187 F. Supp. 101 (D. Md. 1960); Local 725, Int'l Union of Operating Eng'rs v. Standard Oil Co., 186 F. Supp. 895, 903 (D.N.D. 1960).

32. Pacific Northwest Bell Tel. Co. v. Communications Workers, *supra* note 31. See notes 27 & 29 *supra*.

33. See Communications Workers v. Pacific Northwest Bell Tel. Co., 337 F.2d 455 (9th Cir. 1964). This was the second appeal in the case. On the first appeal, see note 32 *supra*, the court sent the case back to the district court to admit evidence of bargaining history. On the second appeal, the court rejected as inconsistent with the court's assigned function of determining arbitrability a union contention for a special rule for collective bargaining agreements to the effect that if bargaining history is required to ascertain the parties' agreement to arbitrate, the dispute must go to arbitration.

34. See Maryland Tel. Union v. Chesapeake & P. Tel. Co., 187 F. Supp. 101, 108 (D. Md. 1960); Local 725, Int'l Union of Operating Eng'rs v. Standard Oil Co., 186 F. Supp. 895, 902-03 (D.N.D. 1960). While taking a very limited view of the interpretation of a collective bargaining agreement, another court allowed certain testimony of bargaining history as relevant evidence of conduct inconsistent with a present claim. Connecticut Union of Tel. Workers, v. Southern New England Tel. Co., 148 Conn. 192, 202, 169 A.2d 646, 651 (1961). For the relevance of such state court decisions to § 301 proceedings, see note 7 *supra*.

for distrust and tension in future negotiations. Holding the parol evidence rule inapplicable to section 301 arbitrability proceedings, moreover, does not open the door to abuses by the parties nor is it an invitation to the courts to speculate, since extrinsic evidence must still constitute "forceful evidence" of agreement not to arbitrate certain grievances[35] in order to overcome the "presumption" of arbitration.[36]

The problem of whether to admit evidence of the bargaining history appears to be closely related to the concern expressed by some courts that the courts are abdicating their explicitly assigned role of determining arbitrability.[37] The tenor of this argument is that the present judicial tendency, influenced by the national policy which favors arbitration, is toward ordering arbitration nearly automatically in any section 301 arbitrability suit where the parties have generally agreed to arbitrate,[38] rather than applying only a presumption of arbitration. It is contended that this "turnstile arbitration" distorts the parties' agreement to arbitrate and undermines the parties' confidence in the institution of arbitration as a voluntary means of resolving disputes.[39] Whether the problem is as grave as some suggest, judicial examination of bargaining history does not mean that in every case such evidence will prevent a grievance from going to arbitration. It does mean, however, that in some cases it may be shown that the parties did not agree to arbitrate,[40] or, on the other hand, that the parties did in fact intend arbitration.[41] Finally, in

35. "In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where . . . the exclusion clause is vague and the arbitration clause quite broad." United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 584-85 (1960).

36. See note 2 *supra*.

37. See *Report of Special Warrior & Gulf Committee*, 1963 PROCEEDINGS, ABA SECTION OF LABOR RELATIONS LAW, pt. 2, at 196. The minority report characterized the problem as "turnstile arbitration." *Id.* at 210. The majority report, on the other hand, said that the courts were properly performing their assigned function. Interestingly, as one indicia of support for their view, the majority said that extrinsic evidence had been held admissible in determining arbitrability, citing Pacific Northwest Bell Tel. Co. v. Communications Workers of America, 310 F.2d 244 (9th Cir. 1962). PROCEEDINGS, *supra* at 206.

38. No doubt this view has arisen at least in part because of the broad language of Mr. Justice Douglas in *Warrior & Gulf:* "Every grievance in a sense involves a claim that management has violated some provision of the agreement." 363 U.S. at 584. See Wellington, *Judicial Review of the Promise To Arbitrate*, 37 N.Y.U.L. REV. 471, 482-83 (1962). Professor Wellington argues for post-arbitration judicial review based on a written opinion of the arbitrator. *Cf.* Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co., 298 F.2d 644 (2d Cir. 1962).

39. See International Union of Elec. Workers v. General Elec. Co., 332 F.2d 485, 494 (2d Cir. 1964) (dissenting opinion).

40. See Communications Workers v. Pacific Northwest Bell Tel. Co., 337 F.2d 455 (9th Cir. 1964); Independent Petroleum Workers v. American Oil Co., 324 F.2d 903 (7th Cir. 1963); Local 725, Int'l Union of Operating Eng'rs v. Standard Oil Co., 186 F. Supp. 895 (D.N.D. 1960).

41. The bargaining history may even show agreement to arbitrate where the

many instances the presumption in favor of arbitration may itself settle the issue where the bargaining history is not of value in determining arbitrability.[42] Nevertheless, the nature of the collective bargaining agreement and the setting out of which it emerges suggest that the parol evidence rule is a needless and unreasonable restriction on the courts in deciding this question.

contract does not. Independent Soap Workers v. Procter & Gamble Mfg. Co., 314 F.2d 38 (9th Cir.), *cert. denied*, 374 U.S. 807 (1963).

42. See Maryland Tel. Union v. Chesapeake & P. Tel. Co., 187 F. Supp. 101 (D. Md. 1960).